Supreme Court, U.S.
FILED
OCT 22 1999
CLERK

No. 99-510

In The

Supreme Court of the United States

INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION, INC. and ROBERT B. GARDNER, COMMISSIONER OF THE INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Petitioners,

v.

ERIC WASHINGTON and CENTRAL CATHOLIC HIGH SCHOOL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL S. STAPLETON
Counsel of Record

CHERYL M. KNODLE
BALL, EGGLESTON, BUMBLEBURG, McBRIDE, WALKEY & STAPLETON, PC
201 Main Street, 810 Bank One Building
P.O. Box 1535
Lafayette, Indiana 47902-1535
(765) 742-9046

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Was the refusal of the Indiana High School Athletic Association, Inc. to grant Eric Washington a waiver of its eight-semester rule, which causes a student-athlete to become ineligible to compete in interschool sports after eight consecutive semesters, counted from the first semester of the student's enrollment in ninth grade, a failure to make a reasonable accommodation under Title II of the Americans with Disabilities Act where Eric withdrew from school because of a learning disability and neither attended nor received credit for a full semester; the IHSAA has granted waivers of the rule in the past for an ill or injured student who withdrew from school and received no credit for the semester; a waiver of the rule would not place an undue administrative or financial burden on the IHSAA; and granting a waiver in this case frustrates no purpose of the rule, either as it applies to Eric individually or in general by setting a precedent that may encourage schools and coaches to abuse the rule.

LIST OF PARTIES

Petitioners are the Indiana High School Athletic Association, Inc. and Robert B. Gardner, Commissioner of the Indiana High School Athletic Association, Inc., and Respondents are Eric Washington and Central Catholic High School.

Petitioner, Indiana High School Athletic Association, Inc., has no parent companies, subsidiaries, or affiliates.

Respondent, Central Catholic High School, has no parent companies, subsidiaries, or affiliates.

TABLE OF CONTENTS

Page

Question presented i

List of Parties ii

Table of Authorities iv

Statement of the Case 1

Argument 6

Conclusion 15

TABLE OF AUTHORITIES

Page

CASES:

McPherson v. Michigan High School Athletic Association, 119 F.3d 453 (6th Cir. 1997)..... 6, 12, 13, 14

Pottgen v. Missouri State High School Activities Association, 40 F.3d 926 (8th Cir. 1994) 6, 8, 10, 11

Sandison v. Michigan High School Athletic Association, 64 F.3d 1026 (6th Cir. 1995).....6, 10, 11

School Bd. of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) 9

Washington v. Indiana High School Athletic Association, 181 F.3d 840 (7th Cir. 1999).....5, 9, 10

STATUTES:

Rehabilitation Act of 1973, § 504..... 9

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131(2) 8, 11

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132.....7, 11

SUPREME COURT RULES:

Supreme Court, Rule 10 7

STATEMENT OF THE CASE

This case is about a learning-disabled student, Respondent Eric Washington ("Eric"), who ran afoul of the "eight-semester rule" of the Petitioner, Indiana High School Athletic Association, Inc. ("IHSAA"), when, because of an undiagnosed learning disability, he could not handle high school academic work. His repeated failures caused him to drop out of school for a time at the advice of educational professionals at his school. Under the IHSAA eight-semester rule, Eric's limited time to participate in interscholastic athletics continued to run during the time he did not attend school.

The IHSAA is an association of public and private high schools in the state of Indiana. The high schools attended by Eric, like most high schools in Indiana, are members of the IHSAA. The purpose of the IHSAA, among other things, is to regulate interschool athletic competition. To that end, it has adopted various rules that limit the eligibility of student athletes to participate in competition.

The rule at issue in the present case, IHSAA Rule C-12-2, commonly known as the "eight-semester rule," limits an athlete's eligibility to compete in interscholastic competition to four consecutive years (equivalent in most schools to eight consecutive semesters), beginning with the semester the athlete enters ninth grade. However, under some circumstances, a semester may be ignored for eligibility purposes. Under IHSAA Rule C-12-3, if a student is injured and that injury either necessitates withdrawal from school or prohibits enrollment, and if the student receives no academic credit for the semester, then

the semester will not count as one of the consecutive semesters for purposes of eligibility. The IHSAA may also set aside the effect of any of its rules under its Rule C-17-8, sometimes known as the "hardship rule," if certain criteria are met.

Eric was a student with a dismal academic record caused by a language-based and reading disability. Although the signs and symptoms of his disabilities were present from the earliest elementary grades in the Lafayette, Indiana, public schools, his disabilities were mis-diagnosed by his teachers and counselors as an "attitude problem." Eric was led to believe that he was lazy, unmotivated, and unfocused. As a result of his poor academic performance, he was required to repeat eighth grade. Eric repeated the first semester of eighth grade, but continued to fail. The school then determined that Eric might not be challenged sufficiently and enrolled him in ninth grade in the middle of the school year at Lafayette Jefferson High School. Under IHSAA Rule C-12-2, this enrollment in ninth grade began the first of his eight consecutive semesters of interscholastic athletic eligibility.

After three semesters of failure at Lafayette Jefferson, Eric's counselor and assistant principal advised Eric and his parents that Eric should withdraw from high school and try to get focused. Eric was in a downward spiral of chronic failure and the constant failure was leaving him emotionally injured. Eric and his parents followed the advice of these professional educators and Eric left school. Eric had never participated in any interscholastic

sport prior to his leaving Lafayette Jefferson and therefore made no attempt to report his withdrawal immediately to the IHSAA or immediately to petition the IHSAA to ignore the semesters he was not in school for purposes of the eight-semester rule. Eric did not attend school for the remainder of the academic year.

During the following summer, Eric participated in a three-on-three basketball tournament where he met Coach Dunwoody from Central Catholic High School in Lafayette, Indiana. Eric was inspired to try and finish high school and he wanted to try and play basketball as part of a team. Eric requested admission to Central Catholic but Central Catholic was reluctant to accept Eric because of his academic record. Central Catholic finally agreed to accept him on a probationary basis. Despite the daily attention of a teacher-mentor and the added incentive of the opportunity to play basketball, Eric continued to struggle academically. After a few weeks of school, his teacher-mentor, Coach Dunwoody, realized that Eric had a significant problem with understanding what he was reading. Coach Dunwoody suggested that Eric be tested for learning disabilities. Eric's parents consented, reluctantly, to the testing, which revealed significant learning disabilities, but also the intellectual capacity to succeed in high school and college.

An Individualized Education Plan (IEP) was implemented for Eric. Because Eric appeared to have some natural talent for basketball, basketball was included in Eric's IEP as a motivational tool. It was felt by professional educators that Eric remained an "at risk" student and that basketball provided him with an opportunity to

do something well so that he might gain self-confidence, self-esteem and social skills lost through years of failure.

After a year at Central Catholic, Eric had only one semester of eligibility to play interscholastic sports remaining. At this time, the IHSAA was requested, for purposes of eligibility, to not count the semester in which Eric was not enrolled in school and received no academic credit. This request appeared to be justified by IHSAA Rule C-12-3, which allows a member school to ignore, for eligibility purposes, a semester in which a student athlete is withdrawn from school and receives no academic credit if the withdrawal is made necessary by an illness or injury. In the opinion of the school psychologist and the learning disability expert, Eric dropped out of school to survive and to end the intolerable spiral of chronic failure and the emotional injury it was inflicting upon him. The request to ignore the semester that Eric was not in school also appears to fit within IHSAA Rule 17-8 (the "hardship rule"), which allows the IHSAA to set aside the effect of any rule if strict enforcement under the particular facts would not serve to accomplish the purpose of the rule, if the spirit of the rule is not violated, and if enforcement of the rule would work an undue hardship under the particular circumstances.

The IHSAA Commissioner denied the request to ignore the semester Eric was out of school on the grounds that Eric's learning disability was not an illness or injury; that Eric's withdrawal was the choice of Eric and his parents and therefore did not present a "hardship"; and that the IHSAA did not consider itself an entity subject to the provisions of either the Rehabilitation Act of 1973 or the Americans with Disabilities Act. The Commissioner's

denial was appealed to the IHSAA Executive Committee and an evidentiary hearing was held. At the hearing, the attorney who represented both the IHSAA and the Commissioner admonished the Executive Committee to "keep in mind, once you grant an exception to a learning disabled person, you are going to have to give one to all sorts of people." The Executive Committee upheld the Commissioner's decision denying any extension to Eric's eligibility.

Subsequently, Eric filed a Verified Complaint for Injunctive Relief in the Superior Court of Tippecanoe County, Indiana. The IHSAA thereafter removed the case to the United States District Court, Northern District of Indiana, Hammond Division at Lafayette. A hearing on the motion for preliminary injunction was held by the district court and the district court granted the motion for preliminary injunction and enjoined the IHSAA from denying Eric Washington eligibility to play interscholastic sports for the spring semester of the 1998-1999 school year. The IHSAA appealed to the Seventh Circuit Court of Appeals, which affirmed the district court's decision to grant the preliminary injunction. *See Washington v. Indiana High School Athletic Association*, 181 F.3d 840 (7th Cir. 1999).

Eric is now too old to play interscholastic sports under IHSAA rules. Furthermore, Eric completed his high school requirements and attends a junior college in Texas. The preliminary injunction enjoining the IHSAA from denying Eric Washington eligibility during the spring, 1999, semester has now ended. The completion of

Eric's high school studies renders moot all issues regarding his previous eligibility to play under IHSAA rules and no issues of future eligibility remain.

Despite the lack of issues between Eric and the IHSAA, the Seventh Circuit held that an actual controversy exists because Central Catholic is still a named party to the litigation and the IHSAA still has an interest in the outcome of the appeal in as much as under its rules it has the authority to penalize Central Catholic for permitting Eric to participate in interschool competition in accordance with the injunction if the injunction is subsequently vacated, stayed or reversed.

ARGUMENT

Reason for Denying the Writ

Review in this case is inappropriate because the Seventh Circuit Court of Appeals correctly applied federal law in determining that waiver of the IHSAA eight-semester rule is a "reasonable modification" of its rules for purposes of finding Eric Washington to be a "qualified individual" under Title II of the Americans with Disabilities Act. Petitioner urges that the Seventh Circuit decision in this case conflicts with *McPherson v. Michigan High School Athletic Association*, 119 F.3d 453 (6th Cir. 1997), *Pottgen v. Missouri State High School Activities Association*, 40 F.3d 926 (8th Cir. 1994), and *Sandison v. Michigan High School Athletic Association*, 64 F.3d 1026 (6th Cir. 1995). However the decision of the Court of Appeals is entirely consistent with these cases.

Under the Rules of the Supreme Court, Rule 10, "[a] petition for a writ of certiorari will be granted only for compelling reasons." The compelling reason cited by the IHSAA is a conflict among the circuits as to the appropriate test under Title II of the Americans with Disabilities Act "for determining whether a student athlete is a 'qualified individual' and whether waiving an essential eligibility rule is a 'reasonable modification.' "

Title II of the ADA prohibits a public entity from discriminating against a "qualified individual with a disability" and from denying such an individual "the benefits of the services, programs, or activities" of the entity. *See* 42 U.S.C. § 12132. Under Title II, a qualified individual is "an individual with a disability, who with or without reasonable modifications to rules . . . meets the essential eligibility requirements for . . . participation in programs or activities. . . . " 42 U.S.C. § 12132. Courts of Appeal in the Sixth Circuit, the Eighth Circuit, and, in this case, the Seventh Circuit have considered whether a waiver of a rule promulgated by a state high school athletic association is a "reasonable modification" of program rules for purposes of Title II.

In the cases considered by the Sixth and Eighth Circuit Courts of Appeal, the courts found that the student athletes were not "qualified individuals" because they could not comply with the rule in question without a waiver and the proposed waivers of the athletic association rules were not "reasonable modifications" of those rules. In the present case, the Seventh Circuit found that waiver of the IHSAA's eight-semester rule was reasonable under Eric Washington's circumstances. The difference in the outcomes in the three circuits is not so much a

difference in the test used by the courts, but in a difference in the factual determinations by the courts based on the circumstances presented in the individual cases.

A. Eighth Circuit – The *Pottgen* Case

In *Pottgen v. Missouri State High School Activities Association*, 40 F.3d 926 (8th Cir. 1994) the Court of Appeals for the Eight Circuit considered whether waiver of an athletic association rule governing the age of sports participants was a "reasonable modification" of the rules under Title II of the ADA. The student athlete in *Pottgen* had learning disabilities that made it necessary for him to repeat several elementary grades. After his learning disability was diagnosed, he was able to progress normally; however, when he became a senior in high school, he was too old under athletic association rules to compete in interschool athletic events. The student requested that the district court enjoin the association from enforcing its age limit for sports participation against him during his senior year and the district court granted a preliminary injunction. The Eighth Circuit reversed, holding that the student was not a "qualified individual" under Title II of the ADA.

In reaching this conclusion, the court first considered whether the association's age rule was an "essential eligibility requirement." *Pottgen*, 40 F.3d at 930. Finding that it was, the court then made an individualized inquiry as to whether the student could meet this requirement "with or without reasonable modification," as required under 42 U.S.C. § 12131(2). *Id.* at 930-931. In its analysis, the court used the same reasoning it had used to determine that the

student was not "otherwise qualified" under another federal statute – Section 504 of the Rehabilitation Act. *Id.* at 931. That is, the court found that the association's age limit rule was an "essential eligibility requirement." *Id.* Once the court found that the age rule was "essential," the court said that totally waiving an essential rule would be a fundamental change, and requiring the association to make a fundamental change in the nature of the program was not required by the ADA (or the Rehabilitation Act). *Id.* at 929-930, & 931, citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n. 17, 107 S.Ct. 1123, 1131 n. 17, 94 L.Ed.2d 307 (1987). Accordingly, the Eighth Circuit determined that the only modification that would help the student was a total waiver, but a total waiver of the rule was not a "reasonable modification" to this "essential eligibility requirement" and thus the student was not a "qualified individual" under Title II of the ADA. *Id.*

The Seventh Circuit, in the present case, believes that focusing on the general purpose behind the rule is the wrong place to begin. *See Washington*, 181 F.3d at 850. Rather, the court prefers to look at whether under the particular circumstances, a waiver "would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change." *Id.* That having been said, the court begins its examination of Eric Washington's particular situation by dismissing the IHSAA's argument that a waiver of its eight-semester rule would be a fundamental alteration in the nature of the program. *Id.* at 852. The court notes that the IHSAA "has granted waivers of the eight semester rule in the past, thereby establishing that waivers do not always work fundamental alterations of the rule." *Id.* The court also notes that

the IHSAA has not supported its contention that a waiver of the rule in Eric's case would place an undue administrative or financial burden on the IHSAA. *Id.* There have been no other cases comparable to Eric's for the IHSAA's consideration in a decade. *Id.* Furthermore, "[t]he IHSAA already conducts individualized inquiries" regarding whether student athletes who are ill or injured should receive a waiver; therefore requiring the association to conduct similar inquires in cases of disability would "not be a significant additional burden." *Id.*

In other words, the Eighth Circuit does not intend to ignore an individualized inquiry into the facts of a case and the Seventh Circuit does not ignore the burdens that considering such waivers would place on the association or disagree that a fundamental alteration of the rule is not required. The Seventh Circuit simply found unpersuasive the IHSAA's argument that waivers under these circumstances would be too burdensome or a fundamental change in its programs. Despite the Seventh Circuit's disagreement with the Eighth Circuit about where to begin its analysis, the analyses of the courts, in the end, contain the same considerations where the facts warrant such considerations. The difference in the outcomes in *Pottgen* and the *Washington* case can be attributed to a difference in the facts rather than in conflicting interpretations of the ADA.

B. The Sixth Circuit – The *Sandison* and *McPherson* Cases

In *Sandison v. Michigan High School Athletic Association, Inc.*, 64 F.3d 1026 (6th Cir. 1995), the Court of

Appeals for the Sixth Circuit, like the Eighth Circuit in *Pottgen*, considered whether waiver of an athletic association rule governing the age of sports participants was a "reasonable modification" of the rules under Title II of the ADA. The circumstances in *Sandison* were similar to those in *Pottgen*, as well. The two athletes seeking accommodation of their disabilities were learning-disabled students who did not advance normally in the elementary grades and who found themselves too old as seniors in high school to compete in interschool athletics.

The *Sandison* court, like the court in *Pottgen*, found that the age rule was an "essential eligibility requirement" under 42 U.S.C. §§ 12131(2) and 12132, and that total waiver of the age restriction would not be a "reasonable modification" of the rules for purposes of viewing the students as "qualified individuals" under the ADA (42 U.S.C. § 12131(2)). *Sandison*, 64 F.3d at 1037. In so finding, the court agreed with the association that including older students in athletic programs so expanded the programs as to work a fundamental alteration in the nature of the program. *Id.* at 1035. In addition, the court agreed that the reason behind the rule was to keep the skill level among schools competitive. *Id.* The court agreed that it would be nearly impossible for anyone to determine whether allowing a particular student to play beyond the age limit was competitively unfair to players on opposing teams because of the complexity of the evaluation, not only of the student, but of the team as a unit and the members of the opposing teams. *Id.*

Sandison, like *Pottgen*, is not in conflict with the Seventh Circuit. The court in *Sandison* made a determination, based on the facts before it, that a waiver of the age rule

would not be reasonable because it would be a fundamental alteration. It did so by looking at the purposes behind the rule. It also found that making a factual determination that an individual evaluation was nearly impossible in these circumstances. If the approach taken by the *Sandison* court is different from that of the Seventh Circuit, it is because it was presented with a different factual situation.

The Sixth Circuit had another occasion to rule on an athletic association rule in *McPherson v. Michigan High School Athletic Association, Inc.*, 119 F.3d 453 (6th Cir. 1997). In *McPherson* the Court of Appeals for the Sixth Circuit considered a waiver of the association's eight-semester rule, which stated that a student who was enrolled in grades nine through twelve for more than eight semesters could not compete in interschool athletic competition. *McPherson*, 119 F.3d at 455. The student athlete in *McPherson* repeated eleventh grade when, for the first time, he participated in varsity basketball. Prior to that time he had been ineligible to participate under the academic standards of his school district, which had a higher standard than the association. During the student's ninth semester, the school district diagnosed him with certain disorders that caused him to be classified under state law as having a "specific learning disability." *Id.* at 456. Thereafter, the student requested that the association waive its eight-semester rule to allow him to play. When the association refused, the student brought an action against the association and others, claiming that the eight-semester rule violated the ADA, as well as other

federal and state law. The district court granted the student a preliminary injunction against the association. The Sixth Circuit reversed.

In essence, the Sixth Circuit determined that the accommodation requested by the student, waiver of the eight-semester rule, was not "reasonable." In reaching this conclusion, the court looked not only at whether the rule was essential to the association's program, but also at whether waiver of the rule under this particular student's circumstances was "reasonable." In determining that waiver of the rule for this student was not reasonable, the court said: "We are not insensible, however, to the plaintiff's contention that the existence of past waivers makes it inherently reasonable to require the MHSAA to grant a waiver in this case. However, there are important differences between those cases and this." *McPherson*, 119 F.3d at 463. Among the differences cited by the court were the fact that the student had been ineligible to play sports during much of his time in high school because of the rules of his school district, not because of the rules of the association. *Id.* The school district never tested the student for learning disabilities until after his sports eligibility had expired. *Id.* To require a waiver under these circumstances would set a precedent that would allow schools and coaches to manipulate a player's eligibility by finding him ineligible, and then later, when he has matured, and presumably is a better player, find him eligible. *Id.* Such a waiver would serve to undermine a fundamental purpose of the rule to make sure that sports do not take precedence over academic concerns. *Id.*

In other words, the Sixth Circuit in *McPherson* makes exactly the same type of individualized inquiry into whether a waiver "would be so at odds with the purposes behind the rule that it would be a fundamental and unreasonable change" as the Seventh Circuit advocates in the present case. The difference in the outcome of *McPherson* and *Washington* is not a difference in the interpretation of federal law by the courts, but in the facts presented. In *Washington*, the Seventh Circuit said:

> The primary goals of the rule are to control redshirting, to prevent the preeminence of athletics over academics, and to keep larger, more advanced players from dominating competition. Mr. Washington was clearly not redshirted. . . . Moreover, waiver of the rule in Mr. Washington's case does not indicate that athletics is valued over education. Indeed, waiver of the rule in Mr Washington's case has promoted his education. . . . Application of the eight semester rule to Mr. Washington does not appear to add anything to the protections provided by the IHSAA's age limit rule, which generally limits the size, strength and athletic maturity of student athletes.

Washington, 181 F.3d at 852. Thus, the circumstances presented in *Washington* were different than those in *McPherson*. The difference in those circumstances justifies a difference in the outcomes.

CONCLUSION

Certiorari is not warranted. The Seventh Circuit correctly applied applicable federal statutes. For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL S. STAPLETON
Counsel of Record

CHERYL M. KNODLE
BALL, EGGLESTON, BUMBLEBURG,
McBRIDE, WALKEY & STAPLETON, PC
201 Main Street, 810 Bank One Building
P.O. Box 1535
Lafayette, Indiana 47902-1535
(765) 742-9046

Counsel for Respondents